JOSEPH M. McMULLEN
California State Bar No. 246757
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Email: Joseph_McMullen@fd.org

Attorneys for Mr. Smith-Baltiher

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE LARRY A. BURNS)

UNITED STATES OF AMERICA, Plaintiff, v. GENARO SMITH-BALTIHER, Defendant.	Case No.: 07CR3161-LAB **STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION**

I.

STATEMENT OF FACTS

On June 4, 2007, Genaro Smith-Baltiher was arrested by the San Diego Police Department and referred to the custody of United States Immigration and Customs Enforcement officials. On July 5, 2007, Mr. Smith-Baltiher waived indictment and was arraigned on an information charging him with two counts of illegal entry in violation of 8 U.S.C. § 1325 in Case No. 07CR1749-LAB. On August 2, 2007, Magistrate Judge Barbara Lynn Major ordered Dr. Bruce Yanofsky to evaluate Mr. Smith-Baltiher's competency pursuant to 18 U.S.C. § 4241.

Dr. Yanofsky prepared a detailed report dated August 22, 2007. See Forensic Psychological Examination at 16, attached hereto as Defense Exhibit B. The report confirmed that while in custody at the Metropolitan Correctional Center and Alvarado Hospital since his arrest in this case, Mr. Smith-

Baltiher has undergone ongoing treatment for Schizophrenia, Polysubstance Abuse, and a seizure disorder, which has involved the daily administration of a variety of antidepressant, anti-psychotic, and anti-seizure medication. Exh. B at 8. In his qualified conclusion that Mr. Smith-Baltiher was competent at the time to stand trial, Dr. Yanofsky cautioned that Mr. Smith-Baltiher is not likely to be consistently competent at all times in the future:

> Thus, based on the analyses of these six factors along with the clinical information available, I opine that at this time Mr. Smith is competent to proceed to trial as he is able to fully cooperate with counsel, disclose meaningful information, and testify in meaningful ways on his own behalf, all of which will lead to the development of a defense. *I would like to highlight the fact that due to Mr. Smith's condition and based on past clinical history it is likely that his competency may be at times jeopardized by an exacerbation of symptoms. Episodes of disorientation and altered consciousness have been present even while Mr. Smith has taken medication.* These episodes appear to be associated with seizure activity, increased stress, loss of sleep, or even drug activity. They have managed medically in the past, but have lead to periods of deterioration in functioning. This situation may occur in the course of a legal process and thus should be kept in mind. If such an episode should occur Mr. Smith may require further evaluation and perhaps medical attention before he is able to continue. However, as noted at present time he is stable and thus competent to proceed.

Exh. B at 16-17.

Based on Dr. Yanofsky's evaluation, on August 30, 2007 Judge Major found that Mr. Smith-Baltiher was competent to proceed and scheduled a change of plea hearing. On October 11, 2007, Mr. Smith-Baltiher pled guilty to an amended two-count information before Judge Major, and was set for acceptance of the plea and sentencing in this Court on November 13, 2007. On that day, this Court granted a continuance of the hearing to November 19, 2007 at defense counsel's request. On November 19, 2007, prior to acceptance of his former plea of guilty by this Court, Mr. Smith-Baltiher requested to withdraw his plea of guilty and this Court, granting his request, scheduled him for a jury trial beginning December 18, 2007.

On December 3, 2007, the Court granted the government motion to dismiss the amended information in Case No. 07CR1749-LAB, Mr. Smith-Baltiher was arraigned on a one-count indictment charging him with violating 8 U.S.C. § 1326(a) and (b) - Deported Alien Found in the United States and a jury trial was scheduled for January 8, 2008, with a motions *in limine* hearing set for the preceding afternoon. On January 7, 2008, at the beginning of the motions *in limine* hearing, defense counsel notified the Court that Mr. Smith-Baltiher had expressed a desire to waive his right to a jury trial and to proceed the next day with a bench trial. See January 7, 2008 Motion Hearing Transcript at 2, attached hereto as Defense Exhibit C. The Court then inquired of Mr. Smith-Baltiher whether he was in fact willing to waive his right to a jury trial and proceed with a bench trial, but contrary to defense counsel's representation that Mr. Smith-Baltiher had been advised of his trial rights and that he desired a bench trial, Mr. Smith-Baltiher expressed bewilderment about the decision:

> THE COURT: IS THAT WHAT YOU WANT TO DO? HAVE YOU MADE THE DECISION TO DO THAT?
>
> THE DEFENDANT: GO TO TRIAL?
>
> THE COURT: YES, GO TO TRIAL IN FRONT OF ME RATHER THAN IN FRONT OF THE JURY.
>
> THE DEFENDANT: WHICH ONE WOULD BE BEST?

Exh. C at 3.

The Court then explained to Mr. Smith-Baltiher the differences between a jury trial and a bench trial, and that he also had a right to waive a trial altogether and plead guilty. Exh. C at 3-7. Mr. Smith-Baltiher thanked the Court and declared "I plead guilty right now." Exh. C at 7. A plea colloquy followed during which Mr. Smith-Baltiher expressed reservations about his citizenship status, and the Court ultimately accepted his plea of guilty. Exh. C at 15, 28. Mr. Smith-Baltiher was scheduled for sentencing on March 24, 2008, and the sentencing hearing has since been continued twice pursuant to a joint motion by the parties, with the sentencing hearing currently scheduled for May 5, 2008 at 9:30 a.m.

Mr. Smith-Baltiher has executed a sworn declaration in which he confirms that on January 7, 2008 he felt over-medicated, disoriented, and unable to think clearly. See Declaration of Genaro Smith-Baltiher, attached hereto as Defense Exhibit A. It was not Mr. Smith-Baltiher's desire to waive his right to trial, and he requests leave of this Court to withdraw his plea of guilty and to proceed to trial. Exh. A.

//

//

II.

MOTION TO WITHDRAW PLEA OF GUILTY

Mr. Smith-Baltiher requests that the Court allow him to withdraw his plea of guilty and to proceed to trial. Rule 11 of the Federal Rules of Criminal Procedure allows for the withdrawal of a guilty plea after the court's acceptance of the plea, but before it imposes sentence, if the defendant can show a "fair and just reason" for requesting the withdrawal. FED. R. CRIM. P. 11(d)(2)(B). The fair and just reason standard "is applied liberally" and does not require a defendant to demonstrate "that his plea is invalid in order to meet his burden of establishing a fair and just reason for withdrawal." United States v. Davis, 428 F.3d 802, 805, 807 (9th Cir. 2005) (quoting United States v. Ortega-Ascanio, 376 F.3d 879, 884 (9th Cir. 2004)). Rather, a defendant may demonstrate a fair and just reason for plea withdrawal by showing that the unforeseen reason "plausibly *could* have motivated his decision to plead guilty. Nothing in Rule 11(d)(2)(B) requires a defendant to show more in order to satisfy the 'fair and just reason' standard." Davis, 428 F.3d at 808 (emphasis in original).

Mr. Smith-Baltiher's inability to think clearly during the motions *in limine* hearing on January 7, 2008 contributed to his unexpected decision to plead guilty on the eve of trial. See Exh. A. As Dr. Yanofsky cautioned several months earlier, Mr. Smith-Baltiher is prone to having his competency temporarily jeopardized by an exacerbation of symptoms of his medical condition. Exh. B at 17. Dr. Yanofsky's opinion that such episodes of incompetency may be associated with seizure activity, increased stress, and loss of sleep, is consistent with Mr. Smith-Baltiher's sworn declaration that he had been experiencing insomnia and increased anxiety before the day of the *in limine* hearing. Exh. A.

This Court need not make a finding on whether Mr. Smith-Baltiher was temporarily incompetent when he gave his plea, nor whether his plea was invalid. See Davis, 428 F.3d at 807. For Mr. Smith-Baltiher to be allowed to withdraw his plea of guilty, it is sufficient that this Court find that his mental state on January 7, 2008 "plausibly *could* have motivated his decision to plead guilty." Id. at 808 (emphasis in original). Given his well-documented history of mental illness and Dr. Yanofsky's conclusion that his competency is likely to be jeopardized at times, coupled with his sworn declaration describing his inability to think clearly on January 7, 2008, as well as his insomnia and anxiety leading up to the hearing, this Court should find that the "liberally applied" fair and just reason standard has been met. Mr. Smith-Baltiher should be allowed to withdraw his plea of guilty pursuant to Rule 11(d)(2)(B).

V.

CONCLUSION

For the foregoing reasons, Mr. Smith-Baltiher respectfully requests that this Court allow him to withdraw his plea of guilty and proceed to trial.

Respectfully submitted,

Dated: April 23, 2008

/s/ Joseph M. McMullen
JOSEPH M. McMULLEN
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Smith-Baltiher

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon:

Paul L. Starita
Paul.Starita@usdoj.gov; efile.dkt.gc1@usdoj.gov

Dated: April 23, 2008

/s/ Joseph McMullen

JOSEPH M. McMULLEN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5030
(619) 234-8467 (tel)
(619) 687-2666 (fax)
e-mail: Joseph_McMullen@fd.org